LIM CHONG WATT

v.

WAWASAN SINMALAND PROPERTIES SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: MT2-22-30-2002]
16 APRIL 2003

CIVIL PROCEDURE: *Summary Judgment - Agreement - Rescission - Whether there was oral misrepresentation - Triable issue - Rules of the High Court 1980 O. 81 r. 2(2) - Evidence Act 1950 s. 92*

By a joint venture agreement dated 22 June 1998 (the JVA), the plaintiff granted the first defendant a power of attorney for the latter to undertake a development project on his land. The development did not proceed as planned and there was delay in obtaining the relevant subdivision approvals. Dissatisfied, the plaintiff applied under O. 81 r. 2(2) of the Rules of the High Court 1980 (the RHC) *inter alia* for the JVA and the power of attorney to be declared null and void and for the withdrawal of the defendant's caveat on the land. The first defendant averred that the JVA could not be terminated as the application for the subdivision approvals had eventually been submitted on 6 April 1999. This apart, the first defendant sought to invoke s. 92 of the Evidence Act 1950 by alleging that the plaintiff had orally misrepresented that the land had been approved for a housing project, thereby impressing upon them that subdivision approvals could be obtained with ease.

Held (allowing the application):

[1] The procedure and governing principles under O. 81 RHC are similar to that under O. 14 thereof. The court is to determine whether the plaintiff's application is eminently suitable for summary judgment in the absence of any triable issue. (*Peninsular Land Development Sdn Bhd v. K Ahmad* [1970] 1 MLJ 149 followed.) Under O. 81 r. 3 of RHC, in order to defend the case, the defendants must satisfy the court that there is an issue or question in dispute which ought to be tried or that there ought to be for some other reason, a trial of the action.
(pp 260 h & 261 a-b)

[2] The parties expressly agreed in cl. 3.1 of the JVA that it is mandatory for the first defendant to submit the application to the appropriate authorities for subdivisional approvals six months from the date of the JVA on 22 June 1998, and so the application ought to have been

submitted by the first defendant on or before 22 December 1998. By submitting on 6 April 1999, the first defendant, therefore *prima facie* occasioned a breach of the said clause, in which case there is a need for the first defendant to give a satisfactory explanation. The absence of such an explanation leaves the *prima facie* breach unrebutted and so the first defendant's contention that the plaintiff is not entitled to terminate the JVA cannot be upheld. (p 261 d-f)

[3] The alleged interruption or interference attributed by the defendants to the plaintiff in relation to the work of the first defendant's architect causing the first defendant's delay ran counter to contemporary documents eg, first defendant's own architect *vide* letter dated 5 March 2001 addressed to the first defendant, confirming that the plaintiff "was only enquiring about the status of the layout plan". The first defendant's allegation has therefore been demolished by the first defendant's own architect and is indeed a non-triable issue. (p 261 h-i & 262 a)

[3a] The first defendant is not an inexperienced housing developer. The first defendant had from the execution of the JVA on 22 June 1998 to the filing of the affidavit in reply in enclosure (10) never raised the issue of the alleged oral misrepresentation. Further, the solicitor preparing the JVA had not affirmed the existence of such oral misrepresentation. The allegation clearly had not been raised at the first available opportunity. The irresistible inference that could be drawn is that such allegation was a red herring and an afterthought to prevent the plaintiff obtaining summary judgment. (p 262 b-c)

[4] In regard to the first defendant's reliance on s. 92 provisos (a) and (b) of the Evidence Act 1950 to admit the evidence of oral misrepresentation, clearly the admissibility of extrinsic evidence under proviso (a) to s. 92 does not include misrepresentation. Proviso (b) to s. 92 allows extrinsic evidence to be adduced only when there is a separate contemporaneous oral agreement as to any matter on which a document is silent. Proof of it may be given when such oral agreement is not inconsistent with or does not contradict the terms of the document. In the instant case, the JVA contained detailed provisions which may be described as a comprehensive code of joint venture. Thus, provisos (a) and (b) of s. 92 are unhelpful to the first defendant. Since all the terms of the JVA were reduced into writing, the contract can only be proven by the JVA itself and it is not open to the first defendant to adduce extrinsic evidence. (p 263 c-f)

Case(s) referred to:
Amalgamated Steel Mills Bhd v. Ingeback (Malaysia) Sdn Bhd [1990] 1 CLJ 750 HC ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 CLJ 30 HC ***(refd)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667 SC ***(foll)***
Peninsular Land Development Sdn Bhd v. K Ahmad [1970] 1 MLJ 149 ***(foll)***
Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400; [1991] 1 CLJ (Rep) 362 SC ***(refd)***
Sigma Cable Co Ltd v. Nam Huat Electric & Sanitary Co & Ors [1972] 1 MLJ 7 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 FC ***(foll)***
Zainal Abidin Jawi v. Mat Hassan Abdul & Anor [1988] 1 MLJ 525 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92(a), (b)
Rules of the High Court 1980, O. 81 rr. 2(2), 3

Other source(s) referred to:
Malaysian High Court Practice, MLJ 1998 Desk Issue, p. 5305

For the plaintiff - Sharifah Shewikar Alhabshi (Lai Kuan Jean); M/s Taye & Co
For the defendant - HL Lee; M/s HL Lee

Reported by Yasmin Norhazleena

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (4) under O. 81 of the Rules of the High Court 1980 for:

(a) a declaration that the agreement dated 22 June 1998 between the plaintiff and the first defendant ("the JVA") is null and void and that the deposit amounting to RM65,000 paid to the plaintiff be forfeited by the plaintiff;

(b) a declaration that the power of attorney dated 22 June 1998 registered in the Melaka High Court *vide* Registration No. 1321/98 is null and void;

(c) an order that the first defendant do within 14 days of this order withdraw the caveat entered on 7 July 1998 vide Private Caveat No. 157 Folio 92 against the land held under Registry Grant No. 10568, Lot No. 1652 in the mukim of Rim, in the district of Jasin, State of Melaka ("the said land");

(d) an order that the second and third defendants do within 14 days of this order cause the first defendant to withdraw the said caveat;

(e) an order that, should the first defendant fail to withdraw the said caveat within 14 days of this order, the Registrar of Titles Melaka do remove the said caveat within 14 days of the service of this order;

(f) an order that the first defendant do deliver vacant possession of the said land free from any encumbrance or restriction within 14 days of this order and that, should the first defendant fail to do so, the plaintiff be authorised to take vacant possession thereof within 30 days of the date of this order;

(g) an order that the second and third defendants cause the delivery of vacant possession of the said land free from encumbrances or restriction to the plaintiff within 14 days of the date of this order;

(h) damages for loss suffered by the plaintiff to be assessed by the court and to be paid by the defendants to the plaintiff;

(i) costs of this action be paid by the defendants to the plaintiff on a solicitor client basis;

(j) such other or further order as deemed fit by the court; and

(k) liberty to apply. These prayers were set out in the minutes pursuant to O. 81 r. 2(2).

Factual Background

For convenience, a reference to a clause or preamble is a reference to the clause or preamble in the JVA. The plaintiff is the registered owner of the said land. The first defendant is a company having a registered address in Johor Bahru while the second and third defendants are directors and shareholders of the first defendant. The parties herein have on 22 June 1998 entered into the JVA whereby:

(a) the plaintiff allowed the first defendant to develop the said land upon all terms and conditions contained in the JVA (cl. 2);

(b) the said land shall be developed by way of a. mixed development comprising shop lots, residential houses and other buildings (preamble 2);

(c) the costs and expenses of developing the said land shall be borne by the first defendant (cl. 2);

(d) the first defendant shall at its own costs and expenses prepare a suitable layout plan for the said project and shall within six months from the date of the JVA submit to the appropriate authorities the necessary applications for subdivisional approvals (cl. 3.1);

(e) "subdivisional approvals" means the approvals given by the authorities unconditionally (or if subject to conditions, such conditions have been accepted by the first defendant) for:

(i) conversion of the category of land use of the said land from "agriculture" to "building";

(ii) amalgamation (if any is required) of the said land or any part thereof;

(iii) subdivision (if any is required) of the said land or any part thereof; and

(iv) the layout plan for the project (cl. 1).

(f) the first defendant shall be given a period of two and a half years from the date of submission of the application to obtain subdivisional approvals at its own cost and expense (cl. 3.2);

(g) in the event the first defendant shall fail for whatsoever reason to obtain subdivisional approvals referred to in cl. 3.1 within the time limited in cl. 3.2, the JVA shall terminate and cease to be of any effect, provided the plaintiff may at his discretion grant such extension of time to the first defendant to obtain subdivisional approvals and upon such terms as the plaintiff may consider reasonable (cl. 4.1);

(h) the subdivisional approvals are deemed not to have been obtained in the event they are granted but subject to conditions which are not acceptable to the first defendant (cl. 4.2);

(i) the security deposit shall be forfeited to the plaintiff if subdivisional approvals were not obtained within the time stipulated in cl. 4.1 or such other extended time provided in that clause (cl. 5.3);

(j) the plaintiff shall execute a power of attorney in favour of the first defendant to enable the first defendant to undertake and perform all acts and things under the JVA (cl. 14.1);

(k) the first defendant undertook to withdraw or cause to be withdrawn any caveat lodged against the said land by the first defendant in the event the first defendant shall fail to proceed with the project or the JVA is terminated pursuant to the provisions contained therein (cl. 29);

(l) the first defendant covenanted to cause all its directors to give the guarantee as stated in the appendix annexed to the JVA (cl. 9.1). The said guarantee which was executed on 22 June 1998 contained, *inter alia*, the following clauses:

(a) to perform the first defendant's obligations under the JVA and in the event the first defendant shall fail, refuse or neglect or omit to perform all or any of its obligations, the second and third defendants shall cause the first defendant to return the said land to the plaintiff free from all encumbrances and with vacant possession, and all costs and expenses, stamp fees and registration fees incurred shall be borne by the second and third defendants (cl. 1); and

(b) in the event the project shall be abandoned or suspended for any reason whatsoever, the second and third defendants shall in their discretion compensate the plaintiff up to Ringgit Malaysia three million and the plaintiff shall transfer the said land to the first defendant.

The first defendant entered the said caveat against the said land on 7 July 1998.

On 12 January 1999, at the request of the second and third defendants on behalf of the first defendant, the plaintiff agreed to give the first defendant an extension of time to enable the first defendant to obtain subdivisional approvals on or before 21 December 2001.

It seems that by 24 December 2001, *vide* a letter from the district and land office Jasin, the first defendant has still yet to obtain subdivisional approvals. On the same date, the plaintiff *vide* the letter from his solicitors Messrs. Taye & Co. notified the first defendant that the JVA has been terminated pursuant to cl. 4.1, that he would forfeit the security deposit and revoke the power of attorney and requested the first defendant to remove the said caveat.

Another letter of the same date was sent to the second and third defendants to the effect that the JVA has been terminated and that they should comply with the guarantee to deliver vacant possession of the said land to the plaintiff.

Submission For Plaintiff

Cik Sharifah Shewikar Alhabshi assisted by Cik Lai Kuan Jean, both learned counsel for the plaintiff, contended that cl. 3.1 required the first defendant to submit the application for subdivisional approvals within six months of the JVA, and that it lapsed on 21 December 1998. They added that cl. 3.2 required the first defendant to obtain subdivisional approvals within two and a half years from the said submission and it lapsed on 21 June 2001. On 12 January 1999, with the extension of six months granted by the plaintiff on the defendants' request, they said that subdivisional approvals must be obtained on or before 21 December 2001. As the first defendant has not obtained such approvals, the plaintiff in their view is entitled to rescind the JVA.

Contention For Defendants

En HL Lee, learned counsel for the defendants, responded to the effect that the first defendant had on 31 December 2001 obtained subdivisional approvals as required by the JVA *vide* letter dated 31 December 2001. That being the case, he contended that the plaintiff could not *vide* his solicitors' letter dated 24 December 2001 terminate the JVA, as the plaintiff was not entitled to do so, since the first defendant had on 6 April 1999 submitted the application for subdivisional approvals.

The second issue raised for the defendants was that the plaintiff was the person who insisted on adherence to strict time frame must not do any act to delay, which the defendants stressed the plaintiff did by "give wrong instructions to the architect" of the first defendant and hence he described this as a triable issue.

The next issue was that the plaintiff has misrepresented to the first defendant that the said land has previously been approved for a housing project, on which the first defendant has relied to enter into the JVA in the belief that easier subdivisional approvals could be obtained. The fourth and final point was that the second and the third defendants were not parties to the JVA but only guarantors against whom summary judgment should not be given.

Decision Of The Court

Summary Judgment For Rescission

The plaintiff's application for summary judgment is made pursuant to O. 81 r. 1(b) for rescission of the JVA; and r. 1(c) for the forfeiture or return of the deposit made under the JVA, on the ground that the first defendant has no defence to the action herein.

O. 81 r. 3 provides as follows:

> (O. 81 r. 3) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action, the Court may give judgment for the plaintiff in the action.

Except for the subject matter, the procedure and governing principles under O. 81 are similar to that under O. 14 and the question for determination by me is whether the plaintiff's application is eminently suitable; for summary judgment to be given in the absence of any triable issue: *Peninsular Land Development Sdn Bhd v. K. Ahmad* [1970] 1 MLJ 149; *Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 CLJ 2400; [1991]

1 CLJ (Rep) 362; *Zainal Abidin Jawi v. Mat Hassan Abdul & Anor* [1988] 1 MLJ 525; *Malaysian High Court Practice* MLJ 1998 Desk Issue p. 5305. Under O. 81 r. 3, in order to defend the case, the defendants must satisfy the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action.

I shall now consider the matter before me in great detail.

Delay In Obtaining Subdivisional Approvals

In respect of the approval which the first defendant has obtained on 31 December 2001, it is to be observed that para. 9 of the first defendant's affidavit affirmed by the third defendant on his own behalf and on behalf of the other two defendants reflected the common stand of the three defendants i.e. the application for subdivisional approvals was submitted by the first defendant on 6 April 1999, which was some 10 months after the execution of the JVA on 22 June 1998.

The parties herein have expressly agreed in cl. 3.1 that it is mandatory for the first defendant to submit the application to the appropriate authorities for subdivisional approvals six months from the date of the JVA on 22 June 1998, and so the application ought to have been submitted by the first defendant on or before 22 December 1998.

By submitting on 6 April 1999, the first defendant has therefore *prima facie* occasioned a breach of cl. 3.1 of the JVA, in which case there is a need for the first defendant to give a satisfactory explanation. The absence of such an explanation leaves the *prima facie* breach unrebutted and so the first defendant's contention that the plaintiff is not entitled to terminate the JVA cannot be upheld.

Further, even assuming for a moment that there is no delay, the above approval is subject to conditions which must be expeditiously accepted or fulfilled by the first defendant. Non-acceptance or non-fulfilment thereof by the first defendant would attract the application of cl. 4.2 and the approval is deemed not to have been obtained. In other words, the approval had been negated by the first defendant's inaction, and so to all intents and purposes, no approval had ever been obtained by the first defendant under the JVA.

Alleged Interference With Architect's Work

The alleged interruption or interference attributed by the defendants to the plaintiff in relation to the work of the first defendant's architect thereby causing the first defendant's delay seems to run counter to contemporary documents e.g. the first defendant's own architect *vide* letter dated 5 March 2001 addressed to the first defendant, confirming that the plaintiff "was only

enquiring about the status of the layout plan" (exh. LCW13 in encl. (11) ie, the affidavit affirmed by the plaintiff). This allegation by the first defendant has therefore been demolished by the first defendant's own architect and is indeed a non-triable issue.

Alleged Oral Misrepresentation

As regards the aforesaid alleged oral misrepresentation by the plaintiff to the first defendant, it is significant to observe that the first defendant is not an inexperienced housing developer at the time of the execution of the JVA containing detailed written provisions. The first defendant had from the execution of the JVA on 26 June 1998 to the filing of the affidavit in reply in encl. (10) never raised the issue of the alleged oral misrepresentation. The JVA was prepared by the first defendant's own solicitors who must have given proper legal advice that the use of the said land was agriculture and that it was essential to apply for subdivisional approvals. That must have been the reason why the JVA has clearly defined "subdivisional approvals" to include, *inter alia*, a conversion of the use of the said land from agriculture to building.

Further, the solicitor preparing the JVA has not affirmed an affidavit averring the existence of such alleged oral misrepresentation. Even at the time of the agreed six-month extension given by the plaintiff to whom the first defendant had paid a sum of RM15,000 by way of consideration the alleged oral misrepresentation had never been raised. If the alleged oral misrepresentation had in fact been a true state of affairs, this allegation would have been raised in the first opportunity, but that was not to be the case here. The only irresistible inference that I can draw and which I hereby do is that this allegation is a red herring or an afterthought to prevent the plaintiff obtaining summary judgment.

Extrinsic Evidence

On the assumption that I had erred in drawing this irresistible inference, I would now proceed to consider whether I could uphold the first defendant's reliance on s. 92 provisos (a) and (b) of the Evidence Act 1950 which are reproduced as follows:

> 92 Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

Clearly the admissibility of extrinsic evidence under proviso (a) to s. 92 does not include misrepresentation, as it is expressly confined to fraud, intimidation, illegality (see *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667 SC; *Amalgamated Steel Mills Bhd v Ingeback (Malaysia) Sdn Bhd* [1990] 1 CLJ 750 HC), want of execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake of fact or law.

Proviso (b) to s. 92 allows extrinsic evidence to be adduced only when there is a separate contemporaneous oral agreement as to any matter on which a document is silent. Proof of it may be given when such oral agreement is not inconsistent with or does not contradict the terms of the document: per Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229, 233 FC; per Zakaria Yatim, J (later FCJ) in *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 1 CLJ 30, 33 HC, per Choor Singh J in *Sigma Cable Co Ltd v. Nam Huat Electric & Sanitary Co & Ors* [1972] 1 MLJ 7, 8 (HC Singapore).

In the instant case, the JVA speaks of detailed provisions which may be described as a comprehensive code of the joint venture.

In the circumstances, provisos (a) and (b) are unhelpful to the first defendant. Instead, under the principal provision in s. 92, since all the terms of the JVA have been reduced to writing, the contract can only proven by the JVA itself and it is not open to the first defendant to adduce extrinsic evidence: per Chang Min Tat FJ in *Tindok Besar Estate, supra*.

Conclusion

Hence the first defendant has failed to raise any triable issue nor shown any other reason for a trial. So also in the case of the second and third defendants. I hold that the plaintiff is entitled to summary judgment under O. 81 for rescission of the JVA and all the prayers as stated in the above minutes. I therefore make an order in terms thereof.